IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 464

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WASHINGTON ALUMINUM COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT R. BAIR,

1409 Mercantile Trust Bldg.,
Baltimore 2, Maryland,
Counsel for Respondent.

Of Counsel:

VENABLE, BAETJER & HOWARD,
1409 Mercantile Trust Bldg.,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

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OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. B of Petition) is reported at 291 F. 2d 869.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the group activity in this case was concerted activity for the purpose of mutual aid or protection with-

in the meaning of Section 7 of the National Labor Relations Act.

2. Whether an employer may discharge "for cause", within the meaning of Section 10(c) of the National Labor Relations Act, employees who suddenly stage a walkout without giving notice or making protest or demand (in the complete absence of a pending grievance or current labor dispute) under circumstances which deny the employer an opportunity to avoid the walkout by negotiation or concession.

STATUTES INVOLVED

The petinent provisions of the National Labor Relations Act not set forth in the Petition are set forth in Appendix A, *infra*, pp. 19-21.

STATEMENT

The Cold Conditions On January 5 Were Fortuitous, Momentary and Completely Unrelated to Pre-existing Working Conditions.

There is no question that at the time of the walkout here involved, working conditions in the plant were less than comfortable by reason of a cold wave, combined with and accentuated by the watchman's inability to start the main furnace which heated the plant. However, these conditions were far from normal, completely fortuitous, and were corrected by Respondent on its own initiative as soon as humanly possible.

The morning of January 5 was one of the coldest experienced during the winter of 1958-59 (R. 49). The temperature at 8:00 A.M. was 15°. The average temperature for the entire day was only 17°, representing minus 18° devia-

tion from normal (R. 90). The freezing temperatures were accompanied by northwest winds averaging 24.4 m.p.h. with gusts up to 43 m.p.h. (R. 90), the highest wind velocities recorded for the entire month (App. B of Petition, p. 19). Six of the seven men honestly admitted that the plant was much colder than on other Monday mornings of that winter (R. 34, 37, 39, 40, 42, 44). Respondent's witnesses also made it unequivocally clear that the cold condition in question did not represent normal working conditions. Tafelmaier, the eighth machinist (the only one who did not join the walkout), wore his overcoat at his machine from 7:30 until 10:30 A.M., at which time normal working temperatures were restored. This was the only morning of the entire winter that he did so (R. 47-49).

As pointed out by the Court of Appeals (App. B of Petition, p. 27), Respondent was fully aware of its responsibility to combat these cold conditions. The night watchman had standing instructions to turn on all furnaces and heaters at such regular intervals as may be necessary to maintain suitable temperatures throughout the plant on cold nights and weekends (R. 50, 64). And on the Sunday evening before the walkout, the company president himself had visited the plant to insure that adequate heat would be provided the employees the following morning (R. 69).

On the morning in question, the watchman, pursuant to orders, had actually turned on the space heaters and a 500,000 B.T.U. furnace at 1:00 A.M. (for one and one-half hours) and again at 5:00 A.M.; ironically however, he was unable to start the 1,500,000 B.T.U. main furnace at either time (R. 50). He notified the company electrician of the difficulty at or about 7:15 A.M., as soon as the electrician arrived at the plant. The electrician immediately diagnosed the trouble as a simple matter of manipulating a

control switch at the rear of the furnace, and the furnace was put into operation within a minute or two after the starting bell rang at 7:30 A.M. (R. 66-67). By 7:45 A.M., the main furnace was burning at full capacity. By 10:00 or 11:00 A.M., the plant was warm (R. 48, 59, 67, 68). By lunchtime, the plant was heated to normal working temperatures and the men were able to take off their denim shop-coats and work in shirt sleeves (R. 59; Tr. 156).

The seven machinists, however, had long since left the plant. Without even giving notice, much less informing their employer "of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them", the men staged the walkout within less than twelve minutes after the starting whistle sounded (R. 55; Resp. Ex. 2). If, instead of staging the precipitous, unilateral walkout, the employees had attempted to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company (if indeed they had any) prior to the walkout, it would most certainly have followed that the walkout and all the consequent labor strife which followed would have been avoided (App. B of Petition, p. 30).

There Was No Pending Grievance or Current Labor Dispute Over Cold Conditions.

The Petition fails to mention the employer's efforts to provide warmer working conditions made in November, 1958 (only two months prior to the January 5 walkout) when employer installed an additional 500,000 B.T.U. furnace in A shop (R. 66), the heat from which flowed into the machine shop (App. B of Petition, p. 18). This evidence destroys whatever vague value the Heinlein testimony had to support the Board's finding that previous com-

plaints had been made about cold conditions.[1] The testimony of George[2] and Caron[3] was similarly vague and unspecific. The most that the testimony of these men proves is that three men, individually, may have griped about the cold to their foreman on some vague occasion or another. Four of the seven machinists did not even testify as to any previous complaints. The foreman and higher management were totally unaware of any specific request that action be taken or of any demand that more heat be brought into the plant, and were unanimous in their testimony that the general gripes about the cold were the same sort of gripes as the gripes made about the heat in the summertime (R. 52-53, 62, 63, 68). The record in this case is devoid of any evidence whatsoever of a pending grievance about cold working conditions or of a pending demand or request, general or specific, made by the men, individually or in concert, that more heat be supplied to the machine shop area. To dignify the testimony above mentioned as evidence of a current labor dispute within the meaning of section 2(9) of the Act is patently absurd.

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[1] Heinlein testified he frequently "*remarked*" to certain persons about the cold; but he could remember no specific date or time (R. 32). When cross-examined as to specific days he spoke to Rushton, Heinlein said "Well, I couldn't say what day. It may have been two or three times during the six months before that. Maybe a year before that. Maybe two years" (R. 34).

[2] "Q. Can you recall any specific time that you complained to Mr. Jarvis? A. On several of the cold mornings I asked Mr. Jarvis [the foreman] why the large furnace wouldn't put out more heat" (R. 36).

[3] "Q. Did you ever make any complaints to anybody concerning that? A. I used to *talk* to Dave [the foreman] that it was cold and miserable.

* * * * * *

"Q. (Trial Examiner) On what day was this, now? A. (The Witness) Not any special day. On cold days."

Caron went on to testify that he never complained to any other company official and that the only specific day he could think of that he complained to the foreman was, he "thought" as to a cold spell two weeks prior to January 5 (R. 25-26). This testimony was not corroborated by any of the other men.

The Walkout Did Not Represent A Protest But Was Rather a Temporizing Response to the Foreman's Statement Made to Caron.

The basic reason for the walkout testified to by all seven men was that it was in response to the invitation or dare contained in the jocular or facetious statement[4] of Jarvis (the foreman) made to Caron (the leader) and relayed by Caron to the men, to the effect that if they had any guts they would go home (R. 27, 30, 33, 37-38, 39-40, 43, 45). Jarvis was not present when the men decided to walk out, having gone to the shipping department with a finished part (R. 55; App. B of Petition, pp. 21-22). He returned to the machine shop a few minutes after 7:30 A.M. just in time to observe the men some distance away walking out the door (R. 55). His immediate reaction was that the men "were kidding" (R. 55), that it was "a put-up joke" (R. 61). He was "flabbergasted" (R. 60). By the time he was able to persuade Tafelmaier, who had lagged behind, not to leave, the other men had left the plant (R. 55-56). If Caron had not reported the Jarvis statement to the men, it is plain that the men would never have walked out of the plant that morning simply because it was cold. The operations of a fabricating plant do not and cannot stop in cold weather. It was frequently necessary from the nature of the business to open large doors to the outside to bring in raw materials and to take out finished products (R. 52).

Completely apart from these proceedings, three of the men, Affayroux, Hovis and Olshinsky, previously testified before the Maryland Department of Employment Security concerning their reasons for walking out. This testimony substantiates the conclusion that the men walked out be-

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[4] Jarvis frequently jested with Caron (App. B to Petition, p. 20, fn. 2).

cause of Jarvis' statement to Caron and negates any possibility that the walkout was meant to constitute a protest. Thus, Affayroux admitted that he had testified "The leader of the machine shop stated that the foreman had said that it was too cold to work and we would be fools if we did not go home" and "*as a result of this statement* by the leader [I] left the job along with the other men" (R. 43, 44). Olshinsky admitted he had testified that "It was customary to take orders from the leader, and [I] was of the opinion that the leader had the authority to permit [us] to go home" (R. 42). Hovis admitted he had testified that the leader of the machine ship had told him that it was too cold to work and that the men were going home, that he had never questioned Caron's authority before and that he *assumed* that the leader was speaking for the foreman (R. 46).[5]

Moreover, the men did not walk out to enforce a demand, refusing to return unless the employer granted some concession. They all intended to return to work the next morning. In fact, George did return to work Tuesday morning, January 6,[6] not knowing he had been discharged (R. 36). Caron testified that as he was leaving, he said to Jarvis, "I will see you tomorrow, I am going home", receiving the reply, "Okay, Babe, I will see you tomorrow"

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[5] The Trial Examiner and the Board (R. 1, 13) place emphasis upon the so-called "credited" testimony of Hovis to the effect that the men all got together and "thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way" (R. 45). This self-serving testimony was completely discredited by and inconsistent with the above mentioned testimony given by Hovis before the Maryland Department of Employment Security on February 24, 1959 (R. 45-46). Parenthetically, it should be noted that if the men walked out under the mistaken impression that they had the foreman's permission, the walkout would not have been for the purpose of "mutual aid or protection". *Scott Lumber Co., Inc.*, 109 N.L.R.B. 1373, 1375 (1954).

[6] January 6 was almost as cold and almost as windy as January 5 (see G. C. Ex. 2).

(App. B of Petition, p. 22, fn. 4). Heinlein testified that "certainly" he was going to return to work the next day (R. 35). Affayroux did not even go home. He went to a nearby diner for some coffee and returned to the plant later that morning (R. 44). Adams went home because he was sick and later obtained a doctor's certificate to substantiate the fact (R. 39).

Summary

As pointed out by the Court of Appeals (App. B to Petition, p. 26), "* * * the record here before us manifests a conspicuous and total absence of any action on the part of the employees to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout." The record also shows that while the men walked out *because* it was cold, the walkout was neither a strike nor a work stoppage *in protest* of working conditions. It was precipitated by a statement of a foreman which was intended as facetious. It was engaged in by all completely without reference to a current labor dispute or a pending demand or grievance and without expressed purpose or stated objective. Management was neither consulted nor informed as to the intended action or the purpose of the walkout and had no opportunity whatsoever by negotiation or concession to avoid the walkout and thus maintain its important machine shop operation. Under the circumstances, the company refused to condone the unilateral precipitous action at the price of abandoning necessary plant discipline, and decided to discharge the men. It is not disputed that the only motivation or reason in discharging the men was to punish them for violating plant rules in leaving their jobs without permission and without informing their foreman of their intentions (App. B. of Petition, pp. 24-25, fn. 6).

ARGUMENT

I.

THE DECISION BELOW WAS CLEARLY CORRECT

The Court of Appeals correctly held that the walkout was not protected concerted activity within the meaning of section 7. "Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."[7] The unannounced walkout engaged in here without informing the employer "of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them", was repugnant to the basic and underlying policy of the Act, as expressed by Congress,[8] the courts,[9] and the National Labor Relations Board,[10] *viz.*, to eliminate industrial strife and unrest "by encouraging the *practice* and *procedure* of collective *bargaining*", to protect the freedom of workers to associate and organize "for the purpose of *negotiating* the terms and conditions of their employment or other

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[7] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42, (1937).

[8] Section 1 of the National Labor Relations Act, as amended, (29 U.S.C. 151); Sections 1(b) and 201(a) of the Labor Management Relations Act (29 U.S.C. 141(b) and 171(a)). (See App. A *infra*).

[9] *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 249, 264-65 (1949); *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 465 (2nd Cir. 1958). See, *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483, fn. 6, 492-93, fn. 22, 23 (1960); *Textile Workers Union of America v. National Labor Relations Board*, 227 F. 2d 409, 410 (D.C. Cir. 1955), *cert. vacated*, 352 U.S. 864.

[10] *Textile Workers Union of America, C.I.O. (Personal Products Corporation)*, 108 N.L.R.B. 743, 746-47 (1954); *Pacific Telephone and Telegraph Co.*, 107 N.L.R.B. 1547, 1549-50 (1954).

mutual aid or protection", and to secure sound and stable industrial peace "by the settlement of issues between employers and employees *through the processes of conference and collective bargaining.*"

Under such circumstances, the right of the Respondent to discipline such action by discharge for cause under section 10(c) "whether or not the acts constituting the cause were committed in connection with a concerted activity" has been clearly expressed by Congress[11] and this Court.[12]

The policy of the Act, then, discourages precipitous unilateral action and presupposes that mutual discussion and bargaining over some demand or grievance shall precede resort to economic pressure. The duty of employees to present their demands to their employer and to advise what concessions can be made to avoid a walkout "is but a facet of the underlying purpose of the entire Act in promoting and encouraging the peaceful settlement of labor disputes". To place the walkout here under the broad protection of section 7 would clearly frustrate that policy and instead of promoting the peaceful settlement of labor disputes would "inject a judicially fashioned element of chaos into the field of labor relations". *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 465 (2nd Cir. 1958).

In addition to being irreconcilable with the basic policy of the Act, the walkout here is not protected by section 7 for a number of other reasons.

1. It is true that section 8(a)(1) protects the right of employees under section 7 "to engage in concerted activities for the purpose of collective bargaining or other mutual

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[11] H. R. Rep. No. 510, 80th Cong., 1st Sess., pp. 38-39.

[12] *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464, 473-74, 477-78 (1953).

aid or protection." But section 8(d) (App. A of Petition, p. 14) points out that collective bargaining is the performance of the *mutual* obligation of the employer and the employees *to meet and confer* with respect to terms and *conditions* of employment. Accordingly, the walkout was not for the purpose of collective bargaining under section 7. Nor was it a protest of working conditions for the purpose of "other mutual aid or protection" under section 7. The evidence shows that the men left the plant *because* it was cold, not in protest of the cold, fully intending to return the next morning, in precipitous response to Jarvis' statement. Moreover, the company, on its own initiative, had done all it could to relieve the cold *before* the walkout, and there is nothing in the record to indicate that an adjustment of the plant thermostats, if requested, would not have brought forth any aid or protection desired by the employees (App. B of Petition, p. 30). A "protest" envisages a future response, whereas in this case the only indicated response of the company had already been made and its responsibility fulfilled. In other words, the walkout did not accomplish and was not intended to accomplish anything more than had already been done voluntarily by the company. If the men did not realize that corrective action had been taken, they had only themselves to blame.

2. As pointed out by Petitioner (Petition, pp. 10-11), a work stoppage is protected by section 7 as a strike only if it partakes the nature of a true and lawful strike. The term "strike" has not been specifically defined by the National Labor Relations Act, as amended, except insofar as section 501 (29 U.S.C. 142) includes within the meaning of the term concerted work stoppages, slow-downs and other concerted interruptions of operations. The term has been defined by the courts, however, as a quitting of work by a body of workmen to enforce a *demand* made on

the employer or to gain some concession, and a refusal to resume work until the *demanded* concession shall have been granted.[13] "[I]t is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will."[14]

3. The Act specifically protects a striking worker from discharge only if the strike or work stoppage occurs in the context of a current labor dispute or the employer is guilty of an unfair labor practice. Thus, section 2(3) defines "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any *current labor dispute* or because of any unfair labor practice * * *." Section 2(9) defines the term "labor dispute" (App. A, *infra*). The holding in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344-45 (1938), which invoked section 7 to protect a strike as concerted activity, was necessarily based on the existence of a current labor dispute and the interplay of section 2(3) with section 2(9).[15] Mere griping or grousing about the cold on some vague unspecific occasions, without

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[13] *National Labor Relations Board v. Illinois Bell Telephone Co.*, 189 F. 2d 124, 127 (7th Cir. 1951), *cert. denied*, 342 U.S. 885; *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134, 138 (4th Cir. 1937), *cert. denied*, 302 U.S. 731; *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939).

[14] Restatement of *Torts*, Section 797, comment a. With all due deference to Chief Judge Sobeloff's opinion that notice equivalent to a demand had been given by the employees to the employer (App. B of Petition, p. 36), it is submitted that notice received without time to act upon it is no better than no notice at all.

[15] See also, *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 at 268, fn. 4 (1949); *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134 at 138-39 (4th Cir. 1937), *cert. denied*, 302 U.S. 731; *C. G. Conn, Limited v. National Labor Relations Board*, *supra* at 397.

more, is far too "inchoate" an activity to warrant the protection of section 7. *National Labor Relations Board v. Office Towel Supply Co., Inc.*, 201 F. 2d 838 (2nd Cir. 1953).

4. The unannounced walkout engaged in with intent to return to work the next morning, but without stated purpose and without giving the employer an opportunity to avoid the walkout by negotiation or concession, held to be an unprotected activity by the *Briggs-Stratton* decision,[16] is clearly a case of employees dictating to their employer the terms of their employment. It is settled law that an employee cannot work and strike at the same time nor fix the hours of his employment or the terms and conditions affecting his employment. *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *National Labor Relations Board v. Condenser Corporation of America*, 128 F. 2d 67, 77 (3rd Cir. 1942); *Hoover Co. v. National Labor Relations Board*, 191 F. 2d 380,389 (6th Cir. 1951); *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 113-14 (2nd Cir. 1952), *affirmed*, 345 U.S. 71 (1953); *Home Beneficial Life Insurance Co., Inc., v. National Labor Relations Board*, 159 F. 2d 280, 286 (4th Cir. 1947), *cert. denied*, 332 U.S. 758; *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3, 11 (7th Cir. 1955).

> "The *Briggs-Stratton* decision illustrates the developing rule that employees are not engaged in concerted activities when, without going on strike and quitting their employment, they 'continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they care to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do

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[16] *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

other work'. The rule has been applied to employees who * * * engage in unannounced work stoppages * * *."[17]

II.

THERE IS NO CONFLICT OF DECISIONS

The Petitioner strains to the breaking point to assert that the decision below is in direct conflict with *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (6th Cir. 153), *rehearing denied*, 210 F. 2d 824 (6th Cir. 1954), *cert. denied*, 347 U.S. 976. In that case, the employees complained first to their foreman and then to their manager about conditions of extreme heat ranging from 90° to 97° caused by a malfunctioning air conditioning system. The grievance lasted for five days from April 25 to April 30 before the employees finally staged a walkout. The work stoppage was held protected because it was begun only after working for five days under unreasonable working conditions and only after their demands had been presented to management without effect. In this connection, on rehearing, the Circuit Court said (210 F. 2d at 825):

> *"The evidence does not sustain respondent's contention that the discharged employees ceased work to win unstated ends. Management was advised of the reason for the stoppage and gave no satisfactory response."*

Every decision cited to the court below by Counsel for the Board in which a work stoppage was held protected, involved a current labor dispute or some demand made upon management accompanied by both the opportunity and the deliberate refusal of management to grant the demanded concession (see App. B to Petition, pp. 30-31, fn. 10).

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[17] Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 337 (1951).

In turn, the decision below for the reasons stated is completely in harmony with every case we have been able to discover which denied section 7 protection to a walkout or work stoppage.[18]

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW TO BE SETTLED.

The decisions of this Court and of the courts of appeal cited herein are all reconcilable one with another and in perfect harmony with the principle here involved. The principle is not novel. It is clearly expressed in the decisions of this Court, the courts of appeal and the National Labor Relations Board, and it would serve no useful purpose for this Court to take jurisdiction of this case merely to reiterate or rephrase the same. The fact is that in this case the Trial Examiner and the Board just simply ignored the underlying policy of the Act as manifest in the express provisions of sections 2(3) and 2(9).

Petitioner's argument that section 7 should protect a walkout without advance notice where a working condition

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[18] *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949); *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483, fn. 6 (1960) (dictum); *Textile Workers Union of America v. National Labor Relations Board*, 227 F. 2d 409, 410 (D.C. Cir. 1955) (dictum), *cert. vacated*, 352 U.S. 864; *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 464, fn. 5 (2nd Cir. 1958); *National Labor Relations Board v. Jamestown Veneer & Plywood Corp.*, 194 F. 2d 192, 194 (2nd Cir. 1952); *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3, 11 (7th Cir. 1955); *National Labor Relations Board v. Massey Gin and Machine Works, Inc.*, 173 F. 2d 758 (5th Cir. 1949), *cert. denied*, 338 U.S. 910 (denying enforcement to 78 N.L.R.B. 189); *National Labor Relations Board v. Reynolds International Pen Co.*, 162 F. 2d 680, 684 (7th Cir. 1947); *National Labor Relations Board v. Condenser Corporation of America*, 128 F. 2d 67, 77 (3rd Cir. 1942); *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *Pacific Telephone and Telegraph Co.*, 107 N.L.R.B. 1547, 1549-50 (1954).

suddenly becomes intolerable (Petition, p. 12) is not persuasive. A walkout in such a situation is plainly and fully protected by section 502 of the Labor Management Relations Act (29 U.S.C. 143), and such protection will be afforded employees even if the walkout was in violation of a no-strike clause in a contract. *National Labor Relations Board v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927.

Nor is this a case where the Court of Appeals introduced "highly subjective judgments into the interpretation" of the term "concerted activities", judgments which rested "upon no discernable standard" — as contended by Petitioner. In the first place, sections 2(3) and 2(9) provide clear and objective statutory standards for determining whether a work stoppage should be protected as a true strike. Secondly, "Section 7 cannot be supposed to protect activities inconsistent with one of the fundamental purposes of the Act * * *."[19] "To the extent that these policies are implicit in the statute and fairly well defined, they furnish a second source of *objective* standards for defining the scope of 'concerted activities'."[20] Courts have regularly decided section 7 cases "without deference to the NLRB" and the relevant factors in a case such as this one "point toward independent judicial determination".[21] "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve * * *."[22]

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[19] Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 332 (1951).

[20] Cox, *op. cit. supra* note 19, at p. 328.

[21] Cox, *op. cit. supra* note 19, at p. 345; Cox, Labor Decisions *of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1065 (1958).

[22] *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944); *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT R. BAIR,
1409 Mercantile Trust Bldg.,
Baltimore 2, Maryland,
Counsel for Respondent.

October 27, 1961.

APPENDIX A

The pertinent provisions of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat. 136, 29 U.S.C. 151, *et seq.*) not set forth in the Petition, are as follows:

SECTION 1.* * *.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection (29 U.S.C. 151).

* * * * * *

SECTION 2. When used in this Act—

* * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined (29 U.S.C. 152(3)).

* * * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee (29 U.S.C. 152(9)).

SECTION 10. (c) * * *.

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause (29 U.S.C. 160(c)).

The pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) not set forth in the Petition, are as follows:

SECTION 1. (b) * * *.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce (29 U.S.C. 141(b)).

SECTION 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers

and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees (29 U.S.C. 171(a));

SECTION 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent * * *; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act (29 U.S.C. 143).